

1 General Government Cabinet  
2 Kentucky Board of Medical Licensure  
3 (New Administrative Regulation)

4 201 KAR 9:240. Emergency Orders and Hearings; Appeals and Other  
5 Proceedings.

6 RELATES TO: KRS 311.530-311.620, 311.990, 218A.205

7 STATUTORY AUTHORITY: KRS 311.565(1)(a)

8 NECESSITY, FUNCTION, AND CONFORMITY: KRS 311.565(1)(a)  
9 authorizes the board to promulgate regulations to regulate the conduct of its  
10 licensees. KRS 311.595 and 311.597 authorize disciplinary action against  
11 licensees for specified offenses. The purpose of this administrative regulation is  
12 to set for the procedure to be followed in handling emergency proceedings before  
13 the board.

14 Section 1. Authority to Issue Emergency Order; Timing. (1) An inquiry panel  
15 or the panel's chair, acting on behalf of the inquiry panel, may issue an  
16 emergency order restricting or suspending a physician's license to practice  
17 medicine or osteopathy within the Commonwealth of Kentucky whenever the  
18 inquiry panel or the panel's chair has probable cause to believe that:

19 (a) The physician has violated one or more terms of an agreed order entered  
20 into between the physician and one of the board's panels, or has violated one or

1 more terms of a disciplinary order issued by one of the board's hearing panels;  
2 or,

3 (b) The physician's practice constitutes a danger to the health, welfare and  
4 safety of his patients or the general public;

5 (2) The inquiry panel will normally make such determination when it  
6 considers a completed investigation pursuant to KRS 311.591(3) at a regularly  
7 scheduled meeting of the inquiry panel;

8 (3) An inquiry panel's chair may act on behalf of the inquiry panel and issue  
9 an emergency order restricting or suspending a physician's license to practice  
10 medicine or osteopathy within the Commonwealth of Kentucky when the panel  
11 chair determines that a ground for emergency order delineated in subsection (1),  
12 supra, exists and the circumstances of the specific case warrant emergency  
13 action prior to the next regularly scheduled meeting of the inquiry panel. If an  
14 emergency hearing is scheduled prior to the next regularly scheduled meeting of  
15 the inquiry panel, the panel chair may also act on behalf of the inquiry panel and  
16 issue the complaint required to support the continuation of the emergency order.  
17 Whenever the panel chair acts on behalf of the inquiry panel pursuant to this  
18 subsection, the panel chair shall report such actions to the inquiry panel at its  
19 next regularly scheduled meeting.

20 Section 2. Findings of Fact and Conclusions of Law. (1) The inquiry panel,  
21 or the panel chair acting on the panel's behalf, may consider any evidence or  
22 information normally considered by the board's inquiry panels in making charging  
23 decisions pursuant to KRS 311.591(3) in making the determination whether to

1 issue an emergency order pursuant to Section 1, supra. Such evidence or  
2 information may include:

3 (a) Applications for licensing or renewal filed by the physician with this or any  
4 other licensing board;

5 (b) Any prior or current order issued by the board or one of its panels  
6 affecting the physician's Kentucky license;

7 (c) Any prior or current order issued by another state's licensing authority  
8 affecting the physician's license in that state;

9 (d) The records of any criminal proceeding involving the physician;

10 (e) A report by or record of any governmental agency, including law  
11 enforcement agencies, and including Kentucky All Schedule Prescription  
12 Electronic Reporting (KASPER) reports or summaries of or references to such  
13 reports;

14 (f) Patient records maintained by the physician, or summaries of or  
15 references to the contents of such records;

16 (g) Records or reports issued or maintained by pharmacies;

17 (h) Records or reports issued or maintained by hospitals, including peer  
18 review reports relating to the physician and medical records of patients treated by  
19 the physician in the hospital;

20 (i) Records or reports issued or maintained by any business;

21 (j) Investigative reports prepared by the board's investigators, including  
22 summaries of verbal or written statements by witnesses and summaries of  
23 evidentiary documents reviewed by the investigators;

1 (k) Investigative reports prepared by the board's investigators involving other  
2 investigations conducted by the board relating to the physician;

3 (l) Oral or written statements by the physician, or the physician's agent,  
4 relating to the investigation;

5 (m) Reports of clinical assessments relating to the physician, including reports  
6 by the Center for Personalized Education for Physicians (CPEP), Denver,  
7 Colorado;

8 (n) Physical or mental evaluations or assessments of the physician;

9 (o) Written reports of patient record reviews conducted by a consultant under  
10 contract with the board to perform such reviews;

11 (p) Written reports of patient record reviews conducted by a licensed  
12 physician performing such review on behalf of the physician;

13 (2) The evidence or information considered by the inquiry panel or panel  
14 chair, acting on behalf of the inquiry panel, shall constitute the board's record of  
15 proceedings relating to the issuance of an emergency order of restriction or  
16 suspension;

17 (3) If the inquiry panel or the panel chair, acting on behalf of the inquiry panel,  
18 issues an emergency order of restriction or suspension against a physician's  
19 license, the emergency order shall be a written order and shall include findings of  
20 fact and conclusions of law, supported by the board's record of proceedings,  
21 upon which the agency bases the emergency order;

22 (4) Any emergency order issued by the inquiry panel or panel chair, acting on  
23 behalf of the inquiry panel, shall be served upon the affected physician in the

1 manner specified in KRS 13B.050(2). The emergency order shall become  
2 effective immediately upon receipt by the affected physician or the physician's  
3 representative.

4 Section 3. Authority to Issue Emergency Order of Suspension Upon Felony  
5 Indictment. (1) If a licensee is indicted in any state for a crime classified as a  
6 felony in that state and the conduct charged relates to controlled substances, that  
7 licensee's practice shall be considered an immediate danger to the public health,  
8 safety or welfare pursuant to KRS 311.592 and 13B.125;

9 (2) If the board receives verifiable information that a licensee has been  
10 indicted in any state for a crime classified as a felony in the state of indictment  
11 and the conduct charged relates to controlled substances, the inquiry panel or  
12 panel chair, acting on behalf of the inquiry panel, shall immediately issue an  
13 emergency order suspending that licensee's Kentucky license;

14 (3) The emergency order of suspension shall remain in effect until such time  
15 as the criminal charges contained in the indictment are finally resolved and the  
16 board's hearing panel has finally resolved the matter after receipt of the court  
17 documents finally resolving the criminal charges in the indictment;

18 (4) If the affected physician should request an emergency hearing, the  
19 hearing officer shall affirm the emergency order of suspension if presented with a  
20 certified copy of the indictment.

21 Section 4. Request for and Timing of Emergency Hearing; Waiver. (1) A  
22 physician required to comply with an emergency order issued by an inquiry panel  
23 or panel chair, acting on behalf of an inquiry panel, may request an emergency

1 hearing at any time between the effective date of the emergency order and the  
2 effective date of an order finally resolving the underlying complaint;

3 (2) Any request for an emergency hearing must be presented to the board in  
4 writing, but may be submitted by facsimile or email. Upon receipt of a written  
5 request for an emergency hearing, the board shall schedule the emergency  
6 hearing on one of the ten (10) working days following the date of receipt of the  
7 written request; the day on which the written request is received by the board  
8 shall not be considered one of the ten (10) working days specified in the statute's  
9 requirement. A written request will be considered received on a particular work  
10 day if it is received by the board during the board's scheduled operating hours for  
11 that day. If the board receives a request for emergency hearing by facsimile or  
12 email received after scheduled operating hours, the request will be considered to  
13 have been received the next scheduled work day of the board;

14 (3) A written request for emergency hearing shall be considered a  
15 certification by the affected physician and the physician's counsel, if any, that the  
16 physician is available to participate in an emergency hearing on any of the ten  
17 (10) working days following the date of the board's receipt of the written request  
18 for emergency hearing. The refusal of the physician to accept a hearing date on  
19 a date specified by the board within the ten (10) working days allotted to the  
20 board by statute to conduct the emergency hearing shall constitute a waiver of  
21 the requirement of KRS 13B.125(3) to conduct the emergency hearing within ten  
22 (10) working days of receipt of a request. If there is a waiver of the ten (10)  
23 working day requirement of the statute, the hearing officer and parties will

1 schedule the emergency hearing to commence at the next date available to the  
2 hearing officer and both parties;

3 (4) Unless there is a waiver of the requirement, the board must commence  
4 the emergency hearing within ten (10) working days of receipt of the written  
5 request for emergency hearing. If the parties are unable to conclude the  
6 emergency hearing on the initial date assigned, the emergency hearing will  
7 resume on the next date available to the hearing officer and both parties and  
8 shall continue on dates available to the hearing officer and both parties until  
9 concluded.

10 Section 5. Scope and Conduct of Emergency Hearing; Hearing Officer's  
11 Role. (1) The emergency hearing may be conducted by the inquiry panel or its  
12 panel chair, acting on behalf of the inquiry panel, or by a qualified hearing officer  
13 appointed by the Board's Executive Director;

14 (2) The singular function of the party conducting the emergency hearing is to  
15 determine whether the findings of fact providing the bases for the emergency  
16 order are supported by substantial evidence and, if so, constitute one or more  
17 violations of KRS 311.595;

18 (3) Given the ten (10) working day requirement of KRS 13B.125(3) and the  
19 unique nature of the hearing, it is not practicable pursuant to KRS 13B.125(3) to  
20 conduct the emergency hearing in conformity with the provisions of KRS  
21 13B.050; 13B.060; 13B.070; 13B.080(2), 13B.080(3)[as it relates to discovery  
22 orders] or (4)[to the extent it conflicts with this regulation]; or KRS 13B.090(1)[to  
23 the extent it prohibits consideration of hearsay evidence], (2)[other than the

1 requirement that all testimony shall be made under oath or affirmation], (3) or (7);  
2 KRS 13B.110 or 13B.120.

3 (4) There shall be no motion practice, prior to or as part of the emergency  
4 hearing, relating to the legality or validity of the emergency order under  
5 consideration or relating to evidentiary issues;

6 (5) As the agency specifically charged by statute with the regulation of the  
7 practice of medicine and osteopathy within the Commonwealth of Kentucky, the  
8 board has determined the standards of acceptable and prevailing practice within  
9 the Commonwealth may be determined by an expert review of a physician's  
10 patient records by a qualified expert. The Board has also determined that it is  
11 professionally appropriate for such expert reviews to be conducted on the  
12 board's behalf by licensed physicians who have entered into a contractual  
13 relationship with the board to serve as board consultants. By entering into  
14 contractual relationships with such licensed physicians, the board has  
15 determined that such physicians are legally qualified to provide expert opinions  
16 regarding the standards of acceptable and prevailing medical practice within the  
17 Commonwealth of Kentucky and to provide expert opinions as to whether the  
18 affected physician has violated those standards or committed other professional  
19 violations of the board's statutes. Pursuant to KRS 13B.090(5), the hearing  
20 officer conducting the emergency hearing shall take official notice that the  
21 findings and opinions within the contractual reviewer's report are technical or  
22 scientific facts within the board's specialized knowledge, shall accept the board's  
23 determination that its contractual reviewers meet the legal qualifications to render



1 such expert opinions and shall recognize that the inquiry panel or panel chair,  
2 acting on the panel's behalf, may consider and accept those opinions rendered  
3 as part of a contractual review of the physician's practice. The party conducting  
4 the emergency hearing shall not conduct a separate hearing or inquiry into the  
5 qualifications of the contractual reviewer who performed the record review on  
6 behalf of the board or of a licensed physician who performed a record review on  
7 behalf of the affected physician;

8 (6) The emergency hearing shall be conducted in the following manner:

9 (a) The Board shall produce and the hearing officer shall accept the record of  
10 the proceedings relating to the issuance of an emergency order under  
11 consideration;

12 (b) The Board shall not be required to produce any further evidence to  
13 support the emergency order. However, the Board may call the affected  
14 physician to testify, as if under cross-examination, regarding the factual accuracy  
15 of evidence or information cited in the record of proceedings relating to the  
16 issuance of the emergency order. Refusal of the affected physician to answer  
17 the board's questions relating to the factual accuracy of evidence or information  
18 cited in the record of proceedings relating to the issuance of the emergency  
19 order, for any reason, shall be considered an interference with the board's ability  
20 to establish the factual accuracy of the evidence or information and a rescission  
21 of the physician's request for emergency hearing;

22 (c) The affected physician may testify, may produce factual evidence,  
23 produce hearsay evidence through documents, or call lay witnesses to the

1 extent that such evidence specifically tends to demonstrate that a factual  
2 statement relied upon by the board's contractual reviewer or by the inquiry panel  
3 or panel chair, acting on behalf of the inquiry panel, is factually incorrect or false;

4 (d) The affected physician may only call the Board's contractual reviewer for  
5 the purpose of cross-examination if the hearing officer determines on the record  
6 that the physician's evidence has established that one or more factual  
7 statements relied upon by the contractual reviewer in their expert report is  
8 demonstrably false or incorrect. If the hearing officer makes such a  
9 determination, the affected party may call the board's contractual reviewer for the  
10 purpose of cross-examination under the following conditions:

11 (i.) The cross-examination of the board's contractual reviewer will be  
12 scheduled at the earliest date available to the reviewer and the parties so long as  
13 such scheduling does not disrupt the normal operation of the reviewer's  
14 professional practice and does not disrupt the care of the reviewer's normal  
15 patients;

16 (ii.) The affected physician shall reimburse the contractual reviewer for the  
17 time spent testifying at the emergency hearing, at the rate normally paid the  
18 reviewer by the board, and shall tender the expected reimbursement to the  
19 reviewer prior to the reviewer's appearance at the emergency hearing;

20 (iii.) The cross-examination of the board's contractual reviewer shall be  
21 limited to factual statements and opinions rendered in the reviewer's report, and  
22 the effect upon such opinions of a determination that one or more underlying  
23 factual statements relied upon by the reviewer is false or factually incorrect;

1 (iv.) Upon completion of the cross-examination, the board and the hearing  
2 officer may ask questions of the contractual reviewer relevant to the cross-  
3 examination.

4 (7)(a) Within five (5) working days of completion of the emergency hearing,  
5 the hearing officer shall issue a written decision in which the hearing officer shall:

6 (i.) Affirm the emergency order if there is substantial evidence of a violation of  
7 law and the inquiry panel has determined that the violation(s) involved constitutes  
8 an immediate danger to the public health, safety, or welfare. If there is  
9 substantial evidence of a violation of law, the hearing officer shall not substitute  
10 his or her judgment as to the level of public protection necessary for the  
11 emergency order;

12 (ii.) Revoke the emergency order only if there is no substantial evidence of a  
13 violation of law. The findings of fact shall be found to be supported by substantial  
14 evidence if there is a factual basis for the findings, even if there is a conflict in the  
15 evidence or information considered by the inquiry panel or panel chair, acting on  
16 behalf of the inquiry panel. A finding that there is no substantial evidence to  
17 support the findings of fact would require a finding that there is a complete  
18 absence of factual basis for the findings; or,

19 (iii.) Modify the emergency order only if the emergency order relied upon  
20 multiple violations of law and the hearing officer has determined that there is no  
21 substantial evidence to support one or more of those violations. In that event,  
22 the hearing officer may consider the remaining violation(s) for which there is  
23 substantial evidence and may modify the level of protection so long as the

1 modified protection fully protects the public health, safety or welfare based upon  
2 the dangers presented by the licensee's commission of the remaining  
3 violation(s).

4 (b) The hearing officer shall not include additional findings of fact or  
5 conclusions of law in any written decision affirming the emergency order under  
6 consideration. The written decision shall be sufficient if it determines that there  
7 was substantial evidence of a violation of law and the panel had determined that  
8 the violation constituted an immediate danger to the public health, safety or  
9 welfare;

10 (c) If the hearing officer should issue a written decision revoking or modifying  
11 the emergency order under consideration, the hearing officer shall include  
12 findings of fact and conclusions of law to support such action.

13 Section 6. Judicial Review. (1) In order to grant relief from a final order  
14 resulting from an emergency hearing, a reviewing Court must conclude that the  
15 hearing officer was clearly erroneous in finding that the findings of fact were  
16 supported by substantial evidence or in finding that the findings of fact  
17 established a violation of one or more provisions of KRS 311.595;


18 (2) A reviewing Court shall not award injunctive relief from a final order  
19 affirming an emergency order of suspension or restriction without providing the  
20 board with a reasonable opportunity to be heard;

21 (3) If the findings of fact are supported by substantial evidence and establish  
22 one or more violations of KRS 311.595, the reviewing Court shall defer to the  
23 professional judgment of the board's inquiry panel or panel chair, acting on

1   behalf of the inquiry panel, as to the specific protections required to protect the  
2   public health, safety or welfare. The reviewing Court shall not substitute its  
3   judgment for the board's as to the level of protection required based upon the  
4   violations found.

Adopted:

7/20/2012  
DATE

  
PRESTON P. NUNNELLEY, M.D., PRESIDENT  
KENTUCKY BOARD OF MEDICAL LICENSURE

**PUBLIC HEARING AND PUBLIC COMMENT PERIOD:** A public hearing on this administrative regulation shall be held on September 26, 2012 at 10:30 p.m. at the offices of the Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222. Individuals interested in being heard at this hearing shall notify this agency in writing by September 19, 2012, five (5) workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until October 1, 2012. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

**CONTACT PERSON:** C. Lloyd Vest II, General Counsel, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222, phone (502) 429-7150, fax (502) 429-7118.

## REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: C. Lloyd Vest II, General Counsel, 310 Whittington Parkway,  
Suite 1B, Louisville, Kentucky 40222: (502) 429-7150.

- (1) Provide a brief summary of:
  - (a) What this administrative regulation does: This administrative regulation establishes the procedure for emergency hearings before the Board.
  - (b) The necessity of this administrative regulation: It is necessary to promulgate this regulation to establish the procedure for emergency hearings before the Board.
  - (c) How this administrative regulation conforms to the content of the authorizing statutes: This administrative regulation acts specifically to establish the procedure for emergency hearings before the Board.
  - (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation acts specifically to establish the procedure for emergency hearings before the Board.
- (2) If this is an amendment to an existing regulation, provide a brief summary of:
  - (a) How the amendment will change this existing administrative regulation; Not Applicable.
  - (b) The necessity of the amendment to this administrative regulation; Not Applicable.
  - (c) How the amendment conforms to the content of the authorizing statutes; Not Applicable.
  - (d) How the amendment will assist in the effective administration of the statutes. Not Applicable.
- (3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This is a new administrative regulation that will affect any licensee that has emergency disciplinary action filed against their license.
- (4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this regulation, if new, or by the change, if it is an amendment, including:
  - (a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: Applicants will be required to follow this procedure if an emergency order has been filed against their license.
  - (b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): The only cost will occur if the licensee has an emergency order filed against their license.



- (c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Licensees will have procedures to follow for emergency orders.
- (5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:
- (a) Initially: None
  - (b) On a continuing basis: None
- (6) What is the source of funding to be used for the implementation and enforcement of this administration regulation: None.
- (7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No increase of fees or funding will be necessary.
- (8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: This administrative regulation does not establish any fees nor does it directly or indirectly increase any fees.
- (9) TIERING: Is tiering applied? (Explain why or why not)

Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all those individuals regulated by it.

## FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number: 201 KAR 9:240  
Contact Person: C. Lloyd Vest II  
Phone number: 502/429-7150

(1) What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? None

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.  
KRS 311.565(1)(a), 218A.205

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect. None

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? None

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None

(c) How much will it cost to administer this program for the first year? None

(d) How much will it cost to administer this program for subsequent years?  
None

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation: